(2)

No. 06-57

FILED

AUG 8 - 2006

In The

Supreme Court of the United States

RUSSELL PENNOCK and ANTOINETTE PENNOCK, in their individual capacities and on behalf of the ESTATE OF DANIEL PENNOCK,

Petitioners,

v.

RICHARD V. LENZI and CARMINE D. LENZI in their individual capacities and d/b/a RIDGE CREST FARMS, MELVIN C. GELSINGER, GALE GELSINGER, ESTHER GELSINGER, CLARENCE D. GELSINGER, RETTEW ASSOCIATES, INC., BERKS COUNTY CONSERVATION DISTRICT, and THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should this Honorable Court consider whether the application of a statute of limitations without the discovery rule in wrongful death and survival claims violates due process, equal protection and privileges and immunities under the Fourteenth Amendment?

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STATEMENT OF JURISDICTION

On April 19, 2006, the Pennsylvania Supreme Court denied the petition for allowance of appeal filed by Petitioners. Such an order constitutes a final order and invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

COUNTER-STATEMENT OF THE CASE

On February 21, 2003, Petitioners, Russell Pennock and Antoinette Pennock, individually and on behalf of the Estate of Daniel Pennock, filed a Complaint under Pennsylvania's Wrongful Death and Survival Statutes for the death of their son, Daniel Pennock. Plaintiffs alleged that Daniel began experiencing a sore throat and other symptoms of illness on March 16, 1995, and that he was subsequently admitted to the hospital on March 19, 1995. On March 20, 1995, Daniel was diagnosed with Staphyloccus Aureus, and it was later determined that he also suffered from a Rotavirus. On April 1, 1995, Daniel Pennock died in the hospital due to these infections.

According to Plaintiffs' Complaint, Dr. David L. Lewis, a scientist working for the Department of Environmental Protection and an alleged expert in the field of pathogens and land application of sewage sludge, reviewed Daniel Pennock's medical records. Dr. Lewis determined that the Rotavirus and staph infection found in Daniel were contracted from Daniel's prolonged exposure to dust and fumes emitted from pathogens found in the sewage sludge applied by Respondents on a farm owned by the Gelsinger defendants.

Petitioners stated in their Complaint that Respondents were negligent in failing to mark the land as an area to which sewage sludge was being applied. They also alleged that Respondents were negligent for failing to notify neighbors of the Gelsinger farm that sludge was going to be applied to the farmland and for failing to restrict the use or access to the farmland for thirty days following application of the sludge.

Respondents filed preliminary objections to Petitioners' Complaint, arguing that Petitioners' claims were barred by the applicable two-year statute of limitations, 42 Pa.C.S.A. § 5502(a), and that that the discovery rule was inapplicable to wrongful death and survival actions under existing Pennsylvania law. Respondents stated in their preliminary objections that Petitioners' claims were time barred because they did not institute their action until almost eight years after Daniel Pennock's death. Respondents further argued that Petitioners had failed to allege any basis upon which relief could be granted under the wrongful death and survival statutes and argued that Petitioners' complaint was deficient as a matter of law and should be dismissed with prejudice.

The Honorable Richard A. Lewis of the Court of Common Pleas of Dauphin County, by Orders dated October 14, 2003 and December 16, 2003, sustained the preliminary objections of Respondents, finding that Plaintiffs' claims were barred by the two-year statute of limitations. Judge Lewis stated as follows in his October 14, 2003, Order:

> "AND NOW, this 14th day of October 2003, upon consideration of the Preliminary Objections submitted by Defendants Lenzi, Gelsinger and Berks County Conservation District, the parties'

> legal memoranda, and oral argument held September 18, 2003, IT IS HEREBY ORDERED that Defendants' Preliminary Objections to Plaintiffs' Complaint on the basis that Plaintiffs' claims are barred by the two-year statute of limitations is SUSTAINED.
>
> While this court is sympathetic to plaintiffs' argument that it is illogical for the discovery rule to apply to causes for personal injury, but not wrongful death, we are constrained by our Supreme Court's ruling in *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (1987). In *Pastierik*, the majority refused to toll the statute of limitations for wrongful death by reason of the discovery rule '[b]ecause death is not an event that is indefinite as to the time of its occurrence, and because survivors are immediately put on notice that they may proceed to determine the cause of death. . . .' *Id.* at 324.
>
> Further, based on this court's ruling resulting in the dismissal of Plaintiffs' claims, all other preliminary objections raised by the Defendants are deemed moot."

Petitioners appealed the decision of Judge Lewis to the Commonwealth Court of Pennsylvania after the entry of a final, appealable order by the Honorable Jeannine Turgeon on July 26, 2004. On September 15, 2005, the Commonwealth Court of Pennsylvania issued its decision, upholding the decision of the lower court in dismissing the claims of Petitioners due to the running of the statute of limitations. The Commonwealth Court found that *Pastierik v. Duquesne Light Company*, 526 A.2d 323 (1986), in which the Pennsylvania Supreme Court refused to apply the discovery rule to wrongful death or survival actions, was the "unequivocal" holding of the

Pennsylvania Supreme Court and "clearly" the law of Pennsylvania. *Pennock v. Lenzi*, 882 A.2d 1057, 1061 (Pa.Cmwlth. 2005).

The Commonwealth Court also rejected Petitioners' claims that the refusal to apply the discovery rule to wrongful death and survival actions was a violation of due process and equal protection rights under the Pennsylvania and United States Constitutions, that it was a violation of the Remedies Clause of the Pennsylvania Constitution, or that it was a violation of the Privileges and Immunities Clause of the United States Constitution. The Commonwealth Court noted that the equal protection and due process provisions of the Pennsylvania Constitution are analyzed under the same standards as the United States Constitution. *Pennock*, 882 A.2d at 1062.

Petitioners then petitioned the Pennsylvania Supreme Court for allowance of appeal, requesting that it review the decision of the Commonwealth Court. However, by Order dated April 19, 2006, the Pennsylvania Supreme Court denied review of the decision. Petitioners have now filed the instant Petition for a Writ of Certiorari, arguing that their due process and equal protection rights under the Fourteenth Amendment have been violated, and also, should the Court find that the right of access to a state court is a privilege of citizenship under the Fourteenth Amendment, that their privileges and immunities rights have been violated. However, Petitioners have not raised any issues that require review by this Court.

REASONS FOR OPPOSING THE WRIT OF CERTIORARI

A. No Review Is Needed To Determine Whether Extinguishing Claims Under A Statute Of Limitations Without The Discovery Rule Violates Due Process

Petitioners argue that this Court has not answered the issue of whether applying a statute of limitations without the discovery rule is a violation of due process by failing to provide an opportunity to sue. The Third Circuit Court of Appeals decided this issue in *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3rd Cir. 1985). The appellants in *Ciccarelli* argued that their due process rights had been violated because their wrongful death and survival claims had been extinguished by the application of the Pennsylvania statute of limitations without the benefit of the discovery rule.

The Third Circuit relied upon this Court's decision in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) when deciding this issue. Quoting Justice Jackson, the Third Circuit indicated that statutes of limitations are "by definition arbitrary, representing a public policy about the privilege to litigate." *Ciccarelli*, 757 F.2d at 555, *citing Chase Securities*, 325 U.S. at 314. The Third Circuit decided that a statute of limitations that extinguishes a claim before the claimant knows that he has sustained an injury will not violate due process if the limitation period is reasonable. *Ciccarelli*, 757 F.2d at 555.

The reasonableness standard relied upon by the Third Circuit finds support in the precedent of this Court. In fact, Petitioners acknowledge this standard in their instant Petition. Petitioners cite *Logan v. Zimmerman*,

455 U.S. 422 (1982) and *Atchafalaya Land Co. v. F.B. Williams Cypress Co.*, 258 U.S. 190 (1922), and state in their Petition that, "[t]here is no doubt under this Court's jurisprudence that a state statute of limitations satisfies the Due Process Clause of the Fourteenth Amendment if it provides a 'meaningful time' to present a claim in a 'meaningful manner,' and if it provides a 'reasonable time' in which to bring a lawsuit." *See Petitioners' Petition for a Writ of Certiorari*, p. 11 (citations omitted).

This Court further stated in *Logan* that a state "certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*, 455 U.S. at 437. In *Atchafalaya*, this Court stated, "such statutes are valid if they allow a reasonable time after their enactment, for the assertion of an existing right or the enforcement of an existing obligation." *Atchafalaya*, 258 U.S. at 197. It stands to reason therefore that this Court has established a reliable means of addressing the due process issue that Petitioners now bring before the Court.

In *Pastierik*, *supra*, the Pennsylvania Supreme Court indicated that there are numerous reasons that the discovery rule is not applied to wrongful death and survival actions. The Pennsylvania Supreme Court decided that the application of the discovery rule to wrongful death claims could potentially expand to infinity the time period in which to bring such a claim. *Pastierik*, 526 A.2d at 521. The Court also determined that death is a definitely established event that puts survivors on notice of a potential claim, which they can immediately begin to investigate to determine its cause. *Id.* at 522. The Court further found that the Pennsylvania legislature did not intend the

discovery rule to apply to wrongful death and survival claims. *Id.* at 521.

A determination of whether Petitioners' due process rights have been violated can be made by applying the reasonableness standard already established by this Court. No review is needed to consider the due process issue raised by Petitioners. The precedent of this Court provides a reliable standard on which to judge potential due process violations caused by the application of a statute of limitations to extinguish a claim. Moreover, applying the reasonableness standard to the instant matter reveals that Petitioners' due process rights have not been violated.

B. No Review Is Needed To Determine Whether The Application Of The Discovery Rule To Personal Injury Claimants But Not Wrongful Death And Survival Claimants Violates Equal Protection

Petitioners argue that this Honorable Court should consider whether their equal protection rights under the Fourteenth Amendment have been violated because the discovery rule in Pennsylvania is applied to toll the statute of limitations for personal injury claimants but is not applied to wrongful death and survival claimants. The Third Circuit considered this exact issue in *Ciccarelli, supra.* The Court found that the distinction drawn between personal injury claimants and wrongful death and survival claimants does not implicate a suspect class nor a fundamental right. *Ciccarelli*, 757 F.2d at 555. Therefore, the Third Circuit reasoned that it is only necessary to determine if the distinction drawn between personal injury claimants and wrongful death and survival claimants is rationally related to a legitimate government interest. *Id.*

The Third Circuit found that the distinction between personal injury claimants and wrongful death and survival claimants is rationally related to the interest of the state in the prompt settlement of the economic and legal affairs of the deceased. *Id.* at 556. The Third Circuit found that it is not irrational for the legislature to encourage a personal representative to bring suit promptly. Citing this Court's decision in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), the Third Circuit found that the statute of limitations applicable to wrongful death and survival actions represents a conclusion by the state that " 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.' " *Ciccarelli*, 757 F.2d at 556.

The Seventh Circuit considered a similar issue in *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979), wherein it was asked to consider whether an Indiana statute that permitted personal injury claimants to seek punitive damages but forbade such damages to wrongful death claimants was a violation of equal protection. The Seventh Circuit noted at the outset that the legislative classification involved neither race nor other "immutable human attributes" and therefore did not constitute invidious discrimination. *Huff*, 609 F.2d at 298. The Court also found that the statute did not involve fundamental rights. *Id.*

Based upon these initial findings and relying upon the precedent established by this Court, the Seventh Circuit decided that the statute was entitled to a presumption of validity and would be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legislative purposes that we can only conclude that the

legislature's actions were irrational." *Id.* at 298, *citing Parham v. Hughes*, 441 U.S. 347, 351 (1979). The Seventh Circuit decided that the statute did not violate equal protection under the Fourteenth Amendment and found that it was not irrational. *Id.*

As noted above, the current application of the Pennsylvania statute of limitations without the discovery rule for wrongful death and survival actions has been held to be reasonable and rationally related to a legitimate government interest. *See Ciccarelli, supra* and *Pastierik, supra.* The distinction drawn between personal injury claimants and wrongful death and survival claimants does not affect those groups that require a strict scrutiny or immediate scrutiny standard but only a rational basis standard, which the statute has survived. *Ciccarelli, supra.*

This Court does not need to review whether the application of the discovery rule to personal injury claimants but not wrongful death and survival claimants is in violation of the equal protection rights of the Petitioners. The established precedent of this Court indicates that a rational basis test should be applied to consider this issue, which the Third Circuit Court of Appeals and Commonwealth Court of Pennsylvania have already done, finding that no violation exists.

C. No Review Is Needed To Determine Whether There Exists A Right Of Access To The Courts Under The Privileges And Immunities Clause Of The Fourteenth Amendment And Whether The Application Of A Statute Of Limitations Without The Benefit Of The Discovery Rule Violates The Privileges And Immunities Clause Of The Fourteenth Amendment

Petitioners argue that review by this Court is needed to determine whether access to state courts is a right of federal citizenship protected by the Privileges and Immunities Clause of the Fourteenth Amendment and whether extinguishing claims without the benefit of the discovery rule is a violation of that right. In *Christopher v. Harbury*, 536 U.S. 403 (2002), Justice Souter indicated that decisions of this Court have grounded the right of access to the courts in various sources, including the Privileges and Immunities Clause of Article IV of the United States Constitution, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment. *Christopher*, 536 U.S. at 415.

In *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142 (1907), this Court stated that "[t]he right to sue and defend in the courts is the alternative of force. * * * It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens." *Chambers*, 207 U.S. at 148. However, and most important to the instant matter, this Court stated specifically that, subject to the restrictions of the Federal Constitution, a state "may determine the limits of

the jurisdiction of its courts, and the character of the controversies which shall be heard in them." *Id.*

In *Blake v. McClung*, 172 U.S. 239 (1898), this Court, citing its prior decision in the *Slaughter-House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873), discussed the effect of the Privileges and Immunities Clause contained within Article IV of the United States Constitution and the rights that it protected.

> "The [Privileges and Immunities Clause] did not create those rights which it called privileges and immunities of citizens of the several states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

Blake, 172 U.S. at 251, *citing*, *Slaughter-House Cases*, 16 Wall. at 77.

In *Blake*, this Honorable Court established that the Privileges and Immunities Clause of Article IV will not be used to limit a state's ability to establish the power of its government over the rights of its citizens. Instead, the Court determined that the Privileges and Immunities Clause will be used to ensure that a state government will apply its laws equally to the citizens of its state and the citizens of other states who find themselves under its jurisdiction.

Petitioners do not argue that their privileges and immunities have been abrogated by the imposition of an inequitable law that treats the citizens of different states unequally. Petitioners argue instead that the expungement of their wrongful death and survival claims without the discovery rule is a violation of their right of access to the courts, which they argue is protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

However, Respondents believe that a decision as to whether the Privileges an Immunities Clause of the Fourteenth Amendment protects and individual's right of access to the courts is unnecessary. As Justice Souter noted in *Christopher*, *supra*, the right of access to the courts has been traced to numerous constitutional provisions. Petitioners do not put forth any compelling reasons why the right of access to the courts should be fastened to yet another provision, nor do they indicate why the current right of access, finding its root of protection in no less than four constitutional articles, is insufficient to protect their right to seek judicial intervention. Petitioners ignore the fact that there is no absolute and unlimited constitutional right of access to the courts. *Ciccarelli*, 757 F.2d at 554. "All that is required is a reasonable right of access, a reasonable opportunity to be heard." *Id.*, *citing*, *Wayne v. Tennessee Valley Authority*, 730 F.2d 392, 403 (5th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985).

The application of the statute of limitations without the discovery rule does not run afoul of Petitioners' privileges and immunities. Petitioners, like all similarly situated individuals, were permitted two years in which to bring a wrongful death or survival action. The Petitioners were given the same opportunity under the law as other

similarly situated persons, and the state did nothing to abridge their right of access to the courts.

Review by this Honorable Court is not needed to determine whether the Petitioners' right of access to the courts is protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The precedent of this Court has grounded the right of access to the courts in numerous constitutional provisions, which afforded the Petitioners with the protection of their right to bring a claim. This Court has set forth a reasonable and reliable judicial framework to determine if an individual has been denied his or her right of access to the courts, and it does not need to consider whether the Fourteenth Amendment protects this right. Furthermore, using the framework established under the Privileges and Immunities Clause of Article IV, Petitioners have not shown any denial or violation of their privileges and immunities. The statute of limitations that applied to their claim for wrongful death is equally applied to other similar claims, and there has been no violation of their privileges and immunities.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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